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In The

Supreme Court of the United States

October Term, 1994

CARPENTERS HEALTH AND WELFARE TRUST FUND FOR CALIFORNIA, CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA, CARPENTERS VACATION AND HOLIDAY TRUST FUND FOR NORTHERN CALIFORNIA, CARPENTERS APPRENTICESHIP AND TRAINING TRUST FUND FOR NORTHERN CALIFORNIA, AND CARPENTERS ANNUITY TRUST FUND FOR NORTHERN CALIFORNIA,

Petitioners,

v.

TRI-CAPITAL CORPORATION; MARK DIVERSIFIED, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' STATEMENT OF QUESTIONS PRESENTED

1. Does ERISA § 515 impose liability on a general contractor as the ERISA "employer" of a delinquent subcontractor's employees based solely on a joint check clause included in the subcontract to protect the general contractor from potential state mechanics' lien liability for subcontractor delinquent contributions?

2. Does amendment of a complaint in a removed action to add a claim within the exclusive subject matter jurisdiction of the federal court and entry of final judgment in the case waive the right to appeal whether the original complaint was properly removed?

3. Is federal question removal jurisdiction over claims that are deemed to be federal under the Complete Preemption Doctrine as articulated in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, (1987), negated by the fact that the artfully pled claim is brought against an improper party in addition to being based on a completely preempted theory?

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I

RESPONDENTS' STATEMENT OF THE CASE

Mindful of the admonition in Supreme Court Rule 15.1 and the request for brevity in Rule 24, Respondents offer a brief correction and supplementation to Petitioners' Statement of the Case. Although Petitioners' description of the proceedings and rulings below is stilted, the opinions, orders and transcripts in the Appendix to the Petitioners' brief speak for themselves.

Respondents cannot, however, ignore the inaccuracies and omissions regarding the agreement between Respondent Mark Diversified, Inc. ("Mark") and the delinquent subcontractor, Stark Construction ("Stark"). Similarly, Respondent Tri Capital Corporation ("Tri Capital") objects to the inference that there was any kind of an agreement between it and Stark or the Petitioners regarding payment of Stark's employee benefit obligations. The statements and innuendo by Petitioners in this regard are contained in the first full paragraph on page 3 of Petitioners' brief.

As the Petitioners note, these cases were resolved pursuant to motions to dismiss under Fed. R. Civ. Proc. 12(b). Respondents recognize here, as they did below, that they must concede all facts alleged in the complaint for purposes of the motion which was granted and affirmed by the lower courts.

A. The Relationship Between the Parties.

Respondent Mark Diversified, Inc. is a non-union general contractor which was hired to construct a project

known as O'Conner-Woods. Mark has no relationship to the Petitioners and is not signatory to any collective bargaining agreements. Mark had no contract with Petitioners or a union compelling it to contribute to benefit programs funded through the Petitioners.

Stark Construction was a subcontractor on the O'Conner-Woods projects. Stark is alleged to have been signatory to a collective bargaining agreement with one or more carpenter union locals. Stark was, according to the complaint, obligated to contribute to the Petitioners.

Respondent Tri Capital Corporation was a construction lender on the O'Conner-Woods project. The complaint does not allege that Tri Capital had any agreement with either Stark or the Petitioners or had any relationship of any kind with Petitioners before this action was filed.

B. The Subcontract Language.

The dubious factual platform on which Petitioners have erected their various legal theories consists of one paragraph in the complaint which, in turn, quotes one paragraph in the subcontract between Mark and Stark. Paragraph 23 of the Amended Complaint alleges:

> The aforementioned subcontract, Exhibit "F" hereto, (hereinafter "Subcontract") was entered into by Mark and Stark on or about December 2, 1988. In that subcontract, Mark expressly agreed to pay fringe benefit contributions. Article 16.4 of said subcontract provides:

> '5) Labor benefits will be paid under a joint check agreement between MDI [Mark Diversified, Inc.], Stark Construction, and the appropriate agency.' (text as in original of Amended Complaint).

Conspicuously absent from the complaint (or the contract incorporated into it) is language through which Mark obligates itself to pay sums in excess of the amount due to Stark under the subcontract. Indeed, Mark's goal was just the opposite – Mark did not want to be placed into a position where it had liability for trust fund contributions of subcontractors such as Stark.

C. Other Missing Facts.

The other glaring omission from the Statement of the Case and the Complaint is the absence of any allegation that the joint check agreement was actually created or that Mark failed to pay Stark everything that Mark owed Stark. There is, in fact, no allegation that Stark claims Mark failed to abide by the terms of its subcontract. Thus, the adventure on which the Petitioners encourage this Court to embark is based on a claim in which there is no allegation that Respondent Tri Capital ever had a contractual obligation to pay Stark's trust fund contributions and no claim by Stark that Mark violated any material terms of their contract.

II

SUMMARY OF ARGUMENT

The Court should reject the Petition to resolve a non-existent split in the Circuits on issues it resolved less than

two years ago. The essence of the Petition for Writ of Certiorari is that Petitioners are unsatisfied with the remedies which Congress afforded them in 1980 by the addition of ERISA § 515, 29 U.S.C. § 1145 (hereafter "ERISA § 515") in the Multi-Employer Pension Plan Amendments Act of 1980 (Pub.L. 96-364 (1980), hereafter "MPPAA"). Bills to provide Petitioners with the remedy they seek from this Court have been continuously pending in Congress since 1991, and none have been passed. Impatient with the legislative process, Petitioners want the Court to judicially re-write the definition of "employer" under ERISA § 3(5), 29 U.S.C. § 1001, to expand remedies under ERISA § 515, and thereby abandon its unanimous decision in *Nationwide Mutual Life Ins. Co. v. Darden*, 503 U.S. ___, 117 L.Ed.2d 581 (1992) (*Darden*).

Secondary to this issue is a request to repudiate the Court's ERISA preemption and removal doctrines. Petitioners want a separate rule when the subject matter of the dispute is a contribution to an employee benefit plan. Petitioners have difficulty arguing that the California lien and stop notice statutes which are specifically designed to facilitate collection of ERISA plan contributions do not "relate to" those plans. 29 U.S.C. § 1144(b) is not a factor because no current exemption exists. Thus, the Petitioners actually request this Court to repudiate the line of ERISA preemption cases which began with *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983).

Finally, Petitioners raise the interesting notion that there was something inappropriate about resolution of their ERISA action in federal court. The trust funds' extremely narrow reading of *Metropolitan Life Ins. Co. v.*

Taylor, 481 U.S. 58 (1987), has already been rejected by this Court in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990). It was the Petitioners, after all, who amended their complaint to state the ERISA claim under 29 U.S.C. § 1132(a) and 29 U.S.C. § 1145. The district court, in granting Respondents' motion to dismiss pursuant to Fed. R. Civ. Proc. 12(b)(6) rendered a judgment on the merits. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 399 N.3 (1981). Petitioners claim, in effect, that the district court lacked subject matter jurisdiction to determine the claim they raised under 29 U.S.C. § 1132(a)(3) because of the removal of the artfully pled ERISA contribution collection action.

Without putting too fine an edge on the matter, it is difficult to find anything worthy of this court's consideration in these issues.

III

ARGUMENT

The sense of *deja vu* which the Court may be experiencing in reviewing this Petition is quite natural. The Court decided the most significant questions of law raised in this case two years ago, when it held that it would construe the term "employee" as it appeared in § 3(6) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1002(6), as incorporating the traditional agency law criteria for identifying master-servant relationships. *Nationwide Mutual Ins. v. Darden*, 503 U.S. ___, 117 L.Ed.2d 581, 587 (1992). It would be anomalous to decide now that the definition of "employer" under the same statute should be determined under a different approach.

The scope of ERISA preemption and the nature of complete preemption and jurisdiction on removal issue raised by this Petition have also been decided in the recent past. This Court held in 1983 that claims which relate to employee benefit plans are preempted by ERISA in the absence of a statutory exception. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983). The Court has re-affirmed this position on at least several occasions thereafter. *See District of Columbia v. Greater Washington Board of Trade*, ___ U.S ___, 121 L.Ed.2d 513 (1992); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133; *FMC Corp. v. Holliday*, 498 U.S. 53; *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985). The *Taylor* case, *supra*, re-affirmed that where, as here, federal preemption is complete, federal question removal jurisdiction exists.

That the Court has recently heard and decided all of the significant issues raised by Petitioners here is undeniable. That Petitioners ask this Court to consume scarce and precious space on its docket to re-hash these issues is inexcusable.

A. There Is No Split In the Circuits on the Definition of "Employer" Under Either ERISA § 3(5) or § 515.

There is no conflict between the Circuit Courts of Appeals who have considered whether a non-union general contractor such as Mark is the ERISA "employer" of its subcontractors within the meaning of either ERISA § 3(5) or § 515, 29 U.S.C. §§ 1002(5) and 1145. Indeed, the

only two Courts of Appeal which have addressed the question specifically presented here are the Ninth and Eleventh Circuits, and the decisions from those courts are easily reconcilable as Petitioners concede. Compare, *Laborers Local 938 Joint Health and Welfare Trust Fund v. B.R. Starnes Co.*, 827 F.2d 1454, 1457 (11th Cir. 1987); *Xaros v. U.S. Fidelity and Guaranty Co.*, 820 F.2d 1176, 1179 (11th Cir. 1988); with the Ninth Circuit's decision in this case below. The only distinction between the Eleventh Circuit's approach and the Ninth Circuit's decision in this case is that the Ninth Circuit declined to adopt a bright line rule whereby execution of the appropriate collective bargaining agreement was the necessary condition precedent to status as an ERISA employer in all situations. That the Ninth Circuit declined to fully embrace the Eleventh Circuit's approach does not help Petitioners here.

Petitioners' speculation as to what other Circuit Courts of Appeal would do if presented with the issue in this case (see Petitioners' Brief, p. 8) is not the equivalent of the conflict between the Circuits which this Court had in mind in drafting Rule 10.1(a). Neither Petitioners' reliance on legislative history (rather than the text of the statute) nor a string of outdated and easily distinguishable cases involving expired collective bargaining agreements can alter this outcome.

Petitioners' total reliance on *Massachusetts Laborers Health and Welfare Fund v. Starrett Paving Corp.*, 845 F.2d 23, 24-25 (1st Cir. 1988) ("*Starrett Paving*"), is grossly misplaced. The First Circuit's views on the definition of "employer" in *Starrett Paving* were a passing reference which did not affect the outcome of the decision. More

importantly, events have overtaken this passing reference in the form of this Court's decision in *Darden, supra.* The key passage in *Starrett Paving* noted:

> We previously left open the question of how to interpret ERISA's definition of "employer" § 1002(5). [cites omitted]. Were we to decide that question now, we should likely side with the plans, accepting the interpretation of our district courts. The legislative history of ERISA shows that when Congress enacted ERISA in 1974, it copied the definition of 'employer' from ERISA's 1958 predecessor, the Welfare and Pension Plan Disclosure Act [cite omitted] and, as far as we can tell, the drafters of the 1958 Act copied FLSA. Before Congress enacted ERISA in 1974, several courts had adopted a 'broader-than-common-law' interpretation of the definition and two Supreme Court opinions used 'economic reality' language. [cite omitted] . . . These factors seem sufficient to warrant similar interpretations of the language defining 'employer' in the two statutes. Thus, we shall assume (but we need not definitely decide) that for purposes of § 1145, appellant Starrett is an 'employer' under § 1002(5).

Massachusetts Laborers Health and Welfare Fund v. Starrett Paving, 845 F.2d at 24-25. *Starrett Paving* dealt with whether an owner of a union signatory corporation could be held individually liable for the corporate employer's delinquent contributions.

This dicta in *Starrett Paving* was published without the benefit of this Court's decision in *Darden,* specifically rejecting arguments that the ERISA definition of "employee" should be given the same meaning as that

term had under the Fair Labor Standards Act, 29 U.S.C. § 203(d). This Court held:

> While the FLSA, like ERISA, defines an 'employee' to include 'any individual employed by an employer,' it defines the verb 'employ' expansively to mean 'suffer or permit to work' [cite omitted]. This latter definition, whose striking breadth we have previously noted, [cite omitted] stretches the meaning of 'employee' to cover some parties who might not qualify as such under strict application of traditional agency law principles. ERISA lacks any such provision, however, and the textual asymmetry between the two statutes precludes reliance on FLSA cases when construing ERISA concepts of 'employee.'

503 U.S. ___, 117 L.Ed.2d at 591. The obvious linkage between the definitions of "employer" and "employee" necessarily compels the same analysis in defining both terms. Thus, whatever value the dicta in *Starrett Paving* and the cases it referred to for support had, disappeared when this Court decided *Darden*.

The other cases on which Petitioners rely as cited on pages 10 through 12 of their brief are easily distinguishable on their facts. Those cases involve either an expired collective bargaining agreement and/or a specific undertaking executed between the party to be charged with the delinquent contributions and either the union or the trust funds seeking those contributions. This situation is a far cry from that presented by a non-union general contractor's joint check agreement with a subcontractor to avoid state lien liability.

In the final objective analysis, the only Circuit conflict presented is in the future and merely potential. It seems unlikely in the extreme that this potentiality will ripen in the face of this Court's decision in *Darden*.

B. Petitioners' Request to Legislate Notwithstanding Congress' Refusal to Do So Should Be Denied.

Petitioners' fallback position is that review should be accepted because the Ninth Circuit's ruling conflicts with Petitioners' understanding of the intent of ERISA § 515. Petitioners scatter phrases such as "undoubted purpose of section 515", "the larger reasons for its enactment", and the statute's "larger purpose" throughout their brief. This argument rises to a crescendo bemoaning the "departure from the legislative history" and condemning the Ninth Circuit's decision below because it "discards the Congressional purpose of enacting section 515, and turns the statute on its head." Conspicuously absent from this line of argument are (1) an allegation that the Ninth Circuit decision violates the language which Congress adopted to describe its intent or (2) specific references to legislative history of ERISA § 3(5) defining "employer" to include non-union general contractors.

The only expression of Congressional intent that matters here is the text of the statute itself. Where the statute's language is plain, the sole function of the Court is to enforce it according to its terms. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1987). As this Court has noted, the best evidence of Congressional intent is the statutory text adopted by both Houses of Congress and

submitted to the President. *West Virginia University Hospitals v. Casey*, 499 U.S. 83, 98 (1991). This is true because the purpose of a statute includes not only what it sets out to change, but also that which it resolves to leave alone. *Id.*

There is nothing ambiguous about ERISA § 515's remedy. Entities like Petitioners are permitted to pursue employers with a contractual obligation to contribute and recover contributions, attorneys' fees, costs, and certain other forms of remedies provided for under 29 U.S.C. § 1132(g)(2). Those remedies against the employer are, however, the exclusive remedy which Congress chose to provide to trust funds like Petitioners. Similarly, there is nothing ambiguous about Congress' definition of the term "employer".

More importantly, for purposes of the petition, there is nothing to suggest that the Ninth Circuit's interpretation of that term is inconsistent with the language of the statute. The vague reference to the legislative history of the statute and Petitioners' efforts to encourage the Court to seek out larger purposes, motivations and goals, is nothing more or less than an invitation to legislate.

This court has specifically rejected this approach recently in *West Virginia University Hospitals v. Casey*, 499 U.S. 83 (1991). There, as here, Petitioner's argument was, in effect, that if Congress did not include the additional remedies sought, it would have done so had Congress thought about it. In rejecting this principle of "statutory construction," the Court quoted Justice Brandeis in *Iselin v. United States*, 270 U.S. 245, 250-251 (1926), which held:

> The statute's language is plain and unambiguous. What the [petitioner] asks is not a

> construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.

Petitioners are asking this court to legislate.

The Court's reluctance should be even greater when, as here, Congress, itself, has specifically chosen to refrain from taking the action which the Petitioners urge. From 1991 to the present, Congress had before it legislation that would have specifically amended ERISA to permit precisely the kind of lawsuit which Petitioners filed. *See* HR 2782, 102d Cong., 1st Sess. (1991); HR 1036, 103d Cong., 1st Sess. (1993); S. 1580, 103d Cong., 1st Sess. (1993). Thus, the rule of law which Petitioners urge this Court to consider has been pending before Congress in one form or another for the last four years. None of the three bills has passed.

This legislative activity establishes the folly of Petitioners' arguments to this Court. Their concerns are being addressed and debated in the appropriate forum, the Congress of the United States. This Court should reject the effort to circumvent the legislative process in the guise of judicial interpretation.

IV

THE NINTH CIRCUIT APPROPRIATELY APPLIED THIS COURT'S WELL-ESTABLISHED RULES CONCERNING ERISA PREEMPTION AND REMOVAL JURISDICTION

The threshold problem with Petitioners' argument regarding ERISA preemption and removal jurisdiction is

that it is not nor can it properly be before the Court due to Petitioners' strategic decisions. The question regarding preemption and removal jurisdiction should have been raised in response to the original complaint. Although the outcome would not change, it could, at least, be said that the issue is properly before the Court.

Petitioners' insurmountable problem is that they selected the one response to the District Court's first order which precluded it from being subsequently reviewed. Petitioners could have withdrawn the request for leave to amend and proceeded with an appeal of both the original dismissal and denial of the motion to remand. Petitioner could also have sought an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Neither of these two options would have precluded Petitioners from filing their separate ERISA action for contributions against Respondent Mark.

For better or worse, Petitioners, by requesting leave to amend the originally dismissed complaint and adding an ERISA collection and breach of fiduciary duty claim under 29 U.S.C. § 1132, waived whatever complaints they may have had regarding the original removal. As Petitioners were aware, the claims they brought against Mark were within the exclusive subject matter jurisdiction of the federal court pursuant to 29 U.S.C. § 1132(e)(1). Consequently, the only jurisdiction in which this combined action could have been heard was in the United States District Court. As the masters of their complaint and the parties who made the strategic decisions resulting in the procedural setting, Petitioners cannot now be heard to complain that the outcome was waiver of the remand issue.

Petitioners need not be unduly upset about this waiver as the issue waived was hopeless from the outset. In the abstract, the parties could agree that the scope of ERISA preemption is not unlimited and that removal jurisdiction exists under the complete preemption doctrine, where the federally preempting statute also provides a claim for the conduct. In this case, the claim would be the ERISA § 515 action for non-payment of ERISA trust fund contributions. Neither of these notions is a new or surprising development in the law pertaining to ERISA or federal question removal jurisdiction.

Petitioners' request for relief suffers from several fatal defects. First, the Petitioners' analysis is based on a reading of this Court's decisions which finds no support in the text of the opinions. Second, Petitioners are not the first to raise these issues, and this Court has already published opinions unambiguously reinforcing its views on ERISA preemption and federal question removal jurisdiction.

Petitioners do not argue the existence of a split in the Circuits or conflict with the decisions of this Court. Instead, Petitioners complain about the interpretation which this Court has placed upon language which was passed by Congress and signed by the President.

The core of Petitioners' dispute with the remand decision is their belief that in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), this Court found that the complete preemption doctrine applied only to ERISA claims cases as to which concurrent jurisdiction exists. *See* Petitioners' Brief, p. 17, *et seq.* No such limitation is discernable either from the text of this Court's opinion or the logic of its analysis.

It is also apparent from this Court's decisions in *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990) and *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), that the Court has already rejected the analysis essential to success on the merits of Petitioners' claim. The state statutes in question here serve no purpose other than to allow ERISA covered employee benefit plans like the Petitioners to attempt to collect delinquent contributions owed to them by signatory employers from other sources. Here, as in *Ingersoll-Rand*:

> We are not dealing here with a generally applicable statute that makes no reference to, or indeed functions irrespective of the existence of an ERISA plan. . . . Here, the existence of a pension plan is a critical factor in establishing liability under the state's . . . law. As a result this cause of action relates not merely to pension benefits, but to the essence of the pension plan itself.

498 U.S. 139-140.

Petitioners' argument that ERISA preemption is limited to state laws that affect plan terms, conditions or administration flies directly in the face of both *Ingersoll-Rand*, and this Court's earlier decision in *Mackey v. Lanier Collections Agency and Service, Inc.*, 486 U.S 825 (1988). The statutes in question here are not general collection statutes but rather statutes which are specifically directed at facilitating the collection of ERISA trust fund contributions from third parties.

In *FMC Corp. v. Holliday*, this Court also rejected arguments similar to those raised by Petitioners here regarding a state anti-subrogation statute. The issue in

Holliday was whether a state law could be used to prevent ERISA plans from recouping assets paid for benefit claims notwithstanding subrogation provisions in the plan documents. The Court had little difficulty in finding that the state laws related to the employee benefit plans within the meaning of 29 U.S.C. § 1144(a). Here as in *FMC Corp.*, the subject of the state statute was collection in favor of ERISA covered employee benefit plans. Admittedly, the state statute in *FMC Corp.* prohibited the collection and the state statutes here purport to permit collection. One of the bedrock principles of ERISA preemption has been that preemption is not avoided simply because a state law aids rather than obstructs an ERISA plan's administration. *See, e.g., Metropolitan Life Insurance Company v. Massachusetts*, 471 U.S. 724, 739 (1985).

This Court has also rejected the notion that ERISA preemption is avoided because state law remedies for ERISA covered conduct are different than those provided under ERISA itself. The remedies provided under § 502 of ERISA, 29 U.S.C. § 1132(a), are the exclusive remedy for rights guaranteed under ERISA. *E.g., Ingersoll-Rand v. McClendon*, 498 U.S. 133, 144 (1990); *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41, 54 (1987). Thus, when Congress added ERISA § 515 providing the remedies under 29 U.S.C § 1132(g)(2), those remedies became the exclusive remedies available under the statute.

It becomes evident that this Court has decided the precise issue which Petitioners seeks to raise in this case. The rights protected under ERISA § 510, 29 U.S.C. § 1140, at issue in *Ingersoll-Rand* and the rights guaranteed under ERISA § 515, 29 U.S.C. § 1145, are each enforced through ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). For this Court's

purposes, and ERISA jurisdiction, there is no difference, analytically, between the issue Petitioners raise and the one the Court resolved in *Ingersoll-Rand, supra.* That the California stop-notice statutes at issue here provide greater remedies than those available under 29 U.S.C. § 1132(a)(3) does not exempt the statutes from ERISA preemption any more than the additional remedies which the plaintiff sought in *Ingersoll-Rand* caused the Texas common law claim to be immune from ERISA preemption.

Another factor compelling the conclusion that the issue Petitioners raise is not significant is ERISA's jurisdictional structure. Where the ERISA claim presented does not fit within 29 U.S.C. § 1132(a)(1)(B), the only court which can hear the claim is the federal court. A finding that complete preemption did not support removal jurisdiction would mean the claim could not be heard. Apart from the lack of logic in this approach, it would be in direct conflict with 28 U.S.C. § 1441(e) which was added to permit federal courts to hear actions removed from state courts that did not have subject matter jurisdiction over the claim.

Petitioners' problem is not with the Ninth Circuit's analysis, but rather with the legislation which Congress enacted as interpreted by this Court.

V

THIS IS NOT AN APPROPRIATE CASE FOR THIS COURT TO REVIEW EVEN IF IT HAS RESERVATIONS ABOUT THE NINTH CIRCUIT'S DECISION

This Court has exercised its power to grant Writs of Certiorari sparingly and more often than not to rectify

mischief in the administration of justice which has the potential for significant nationwide negative impact. Similarly, if silently, the Court no doubt avoids cases where the disruption from granting Certiorari exceeds the good which can be accomplished. Respondent respectfully submits that regardless of the Court's views on the merits of this case, granting the Petition for Writ of Certiorari in this case would be a very bad idea.

The language which exists in the subcontract at issue between Mark and Stark is not unique. General contractors nationwide use similar language to protect themselves from the risk of being forced to pay twice on labor and materials by operation of state mechanics' lien statutes. The definition of employer in ERISA is also similar to the definition of employer in the National Labor Relations Act, 29 U.S.C. § 152(2) among other federal statutes regulating the employment relationship. Straying from *Darden* now would raise far more questions about a concept basic to federal labor law than the Court could hope to answer in one case. This similarity of definitions and the ubiquitous frequency with which joint check agreements are used in the construction industry militates against granting Certiorari in this case even if the Court believes that the term "indirectly in the interests of the employer" in the ERISA definition requires some exploration.

The notion that a garden variety joint check agreement between a non-union general contractor and its union subcontractors could make the general the "employer" of the subcontractor's employees would have a number of immediate and potentially negative consequences. How, for example, would a general contractor make the delinquent contribution payments without running afoul of 29

U.S.C § 186(a)? If the contractor could not avoid employer status through a joint check agreement, and the joint check agreement is the primary means for avoiding mechanics' lien liability, the logical solution for the general contractors would be to refrain from using union subcontractors. It is unlikely that such a response would improve the funding of multiemployer benefit plans.

It is also worth considering the impact which would occur with respect to the general contractor's employees and benefit plans. The construction of the term "employer" which Petitioners urge on this Court would, if adopted, apply to the general contractor's plans and likely spill over to the tax side of ERISA affecting everything from minimum/maximum contribution rules, reporting and disclosure requirements to non-discrimination rules, and prohibited transaction requirements among others. As this court has noted from time to time, portions of ERISA may not be a model of legislative drafting, but it is nonetheless an integrated and interlocking scheme. Simply granting the petition for Writ of Certiorari in this case may have destabilizing consequences well beyond what the parties or the Court could anticipate in advance.

In the final analysis, Petitioners are attempting to use this Court to accomplish goals which they were unable to accomplish or did not attempt with the 1980 MPPAA amendments creating ERISA § 515. The rule of law sought has also eluded Petitioners despite substantial progress in both the 102nd and 103rd Congress.

Granting the petition here should lead to affirmance of the Ninth Circuit's decision for the reasons stated in the Court of Appeal's decision, thereby wasting the Court's

precious resources. It could also lead to an exercise in judicial legislation in a complex area with mechanism which are ill-suited to gaining a full appreciation of all the consequences which would flow from reversal of the decision in question.

VI

CONCLUSION

Respondents respectfully request that the Court either summarily affirm the Ninth Circuit's decision in this case, or in the alternative, deny the Petition for Writ of Certiorari.

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Respectfully submitted,

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